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No. 87-1245

In The
Supreme Court of the United States
October Term, 1987

TEXAS MONTHLY, INC.,

Appellant,

vs.

BOB BULLOCK, Comptroller of Public Accounts of the State of Texas, JIM MATTOX, Attorney General of the State of Texas, and ANN RICHARDS, Treasurer of the State of Texas,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

1. Whether a state statute exempting from a general sales tax only those "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith" unconstitutionally discriminates in the taxation of periodicals based on content under this Court's decision in *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722 (1987).

2. Whether a state statute exempting from a general sales tax only those "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith" is invalid as violative of the Establishment Clause of the First Amendment.

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BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Texas Court of Appeals on rehearing, which appears in the Appendix to the Jurisdictional

[1]Appellant is a wholly-owned subsidiary of Mediatex Communications Corporation. Texas Monthly Press, Inc., Mediatex Development Corporation and Mediatex Broadcasting Corporation are Appellant's affiliated companies. Appellant has no subsidiaries and no other parent companies or affiliates.

Statement (J.S. App. 1), is reported at 731 S.W.2d 160 (Tex. App.—Austin 1987, writ ref'd n.r.e.). The original opinion of the Texas Court of Appeals dated March 18, 1987, which was subsequently withdrawn, is not reported. It is reprinted at J.S. App. 23.

The final judgment and the findings of fact and conclusions of law of the district court are not reported. They are reprinted at J.S. App. 42 and 46.

JURISDICTION

The judgment of the Texas Court of Appeals on rehearing was entered on May 27, 1987. The Court of Appeals overruled Appellant's timely filed motion for rehearing on June 24, 1987. Thereafter, on September 23, 1987, the Texas Supreme Court refused Appellant's timely filed application for writ of error with the notation, "no reversible error." A motion for rehearing was entertained and overruled on October 28, 1987.[2]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

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[2]This appeal is properly taken from the Texas Court of Appeals and not the Texas Supreme Court. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides, in relevant part:

> Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech, or of the press . . . .

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 151.312 of the Texas Tax Code provides:

> Periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith are exempted from the taxes imposed by this chapter.

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STATEMENT OF THE CASE

This is an appeal from a decision of a Texas Court of Appeals holding that a state statute exempting from a general sales tax only those "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith" does not unconstitutionally discriminate in the taxation of periodicals based on content under this Court's decision in *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722 (1987), nor violate the Establishment Clause of the First Amendment.

Effective October 2, 1984, the Texas legislature repealed an existing broad exemption from state sales tax for magazine subscription sales.[3] Remaining in effect, however, was an exemption for "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith." No other magazines were exempted.

Appellant publishes *Texas Monthly* magazine, a monthly general interest magazine with a circulation of approximately 280,000. While *Texas Monthly* magazine sometimes carries articles on religion, no issue of the magazine consists wholly of writings promulgating the teaching of a religious faith, and Appellant is not a "religious faith". Consequently, Appellant was required to collect and remit to the State a tax equal to 6.125% of the subscription sales price of its magazine.

In 1985, Appellant paid, under protest, sales taxes of $149,107.74 and, under the appropriate state procedure, brought this action to recover those taxes. One of the grounds for recovery was that the exemption for religious periodicals contained in Section 151.312 violated Appellant's rights under the First and Fourteenth Amendments to the Constitution of the United States. J.A. 6.

After a two day trial before the court, the district court entered judgment in favor of Appellant in the amount of

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[3]This exemption was reenacted by the Texas legislature effective October 1, 1987, and Appellant's subscription sales are thus currently exempt from state sales tax. Tax payments for the period the tax was in effect remain in controversy. In addition, sales of Appellant's magazine from a newsstand have been and continue to be subject to state sales tax.

$149,107.74, plus interest. J.S. App. 43. The court held that Section 151.312 of the Texas Tax Code was unconstitutional "because it constitutes an unlawful discrimination based on the content of [Appellant's] publication in violation of its rights under the First and Fourteenth Amendments of the U.S. Constitution. . . ." J.S. App. 42, 47.[4]

Appellees appealed to the Court of Appeals for the Third Supreme Judicial District of Texas, at Austin. A majority of the three-judge panel of the Court of Appeals reversed the judgment of the district court and rendered judgment for Appellees, upholding the constitutionality of Section 151.312. The court held that Section 151.312 did not unconstitutionally discriminate between periodicals based on content. The Texas court distinguished this Court's decision in *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722 (1987), in which the Court struck down a state sales tax scheme that taxed general interest magazines but exempted "religious, professional, trade and sports journals." The Texas court, ignoring this Court's discussion of content-based discrimination in *Arkansas Writers' Project*, limited that case to situations in which: (i) a tax treats the press differently from other enterprises, or (ii) a tax targets a small group within

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[4]Appellant also sought to recover on the grounds that, as the sales and use tax system is applied by Appellees, the tax operates as a gross receipts tax on magazine subscription sales and discriminates against magazines published in Texas. J.A. 6; *see Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). The district court did not rule on either of these questions, having concluded that Appellant was entitled to relief because of the unconstitutionality of the religious periodical exemption. J.S. App. 44.

the press as a whole.[5] The Court of Appeals further held that Section 151.312 did not unconstitutionally favor religion in violation of the Establishment Clause of the First Amendment. The dissenting judge would have held the differential taxation of religious and other periodicals unconstitutional on Establishment Clause grounds.

Appellant reiterated its First and Fourteenth Amendment claims, including a claim that Section 151.312 violated the Establishment Clause, in its application for writ of error filed in the Texas Supreme Court. The Texas Supreme Court refused the application for writ of error with the notation, no reversible error.

SUMMARY OF ARGUMENT

I. Texas has a sales and use tax system that requires consumers to pay a tax upon the purchase or use of most tangible personal property. Texas Tax Code Ann. § 151.001, *et seq.* During the period involved in this case, magazines and other periodicals were subject to the tax, along with all other goods bought and used in Texas. Every person who bought or read a magazine in Texas was obligated to pay the tax except those people who purchased or read "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith." And all

[5]The evidence before the trial court was that there were 20 to 30 taxpayers that paid the tax. J.A. 100. The evidence at the trial established that the sales and use tax system in Texas operates to discriminate against magazines selling to subscribers in general and Texas-based publishers in particular. See J.A. 118-141.

of the publishers of magazines or periodicals that did not come within the exemption were obligated to collect the tax and remit the revenue to the State.

The exemption for religious periodicals is wholly inconsistent with the holding of this Court in *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722 (1987), because the exemption discriminates on the basis of the content of the periodical. In *Arkansas Writers' Project* the Court pointed out that if the articles in *Arkansas Times* had been "uniformly devoted to religion," that magazine would not have been subject to the Arkansas tax, 107 S. Ct. at 1728. Here, if Texas Monthly, Inc. was a "religious faith" and its magazine devoted to the "teachings of a religious faith," the purchase or use of *Texas Monthly* would have been exempt from the sales and use tax.

Thus Section 151.312 suffers from the same flaw as did the Arkansas statute: "a magazine's tax status depends entirely on its *content*." 107 S. Ct. 1727. Texas, like Arkansas, "faces a heavy burden in attempting to defend its content-based approach to taxation of magazines. In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Id.* at 1728. The Texas exemption serves no compelling interest. It simply provides an unlawful subsidy to religious organizations and entangles state officials in religious affairs, disturbing the general system of taxing all sales of tangible goods by religious groups.

II. The Texas statute exempting from sales tax only those "periodicals that are published or distributed by

a religious faith and that consist wholly of writings promulgating the teaching of the faith" is also unconstitutional because it constitutes a "law respecting an establishment of religion." As this Court has pointed out, a tax exemption is similar to a direct governmental subsidy. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983). Payment of a subsidy by the goverment solely to promote religious messages, when no other messages are subsidized, clearly violates the Establishment Clause. The exemption thus is unlawful under the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), because it advances religion. It further results in excessive entanglement because it requires governmental ecclesiastical review as a prerequisite to its applicability.

ARGUMENT

1. The Texas sales tax scheme unconstitutionally discriminates between periodicals based on content.

The decision of the Texas Court of Appeals leaves standing a statutory sales tax scheme that grants or withholds a tax benefit based on a publication's *content*. Specifically, the state statute exempts from the general sales tax only those "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith." This

tax scheme offends the First and Fourteenth Amendments.[6] Further, the holding of the Texas Court is directly contrary to this Court's decision in *Arkansas Writers' Project, Inc. v. Ragland,* 107 S. Ct. 1722 (1987), as well as other recent decisions of this Court.

The dangers posed to freedom of speech are manifest where the application of a tax depends on the content of speech. *See Speiser v. Randall,* 357 U.S. 513 (1957). This Court has not hesitated to condemn, as a threat to protected First Amendment expression, content-based discrimination. The Court has not minced words: In *Police Department of Chicago v. Mosley,* 408 U.S. 92, 95 (1972), the Court stated:

> But, above all else, the First Amendment means that government has no power to restrict expression because of its messages, its ideas, its subject matter, or its content.

Most recently, the Court held:

> [O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press.

Arkansas Writers' Project, Inc. v. Ragland, supra, at 1728. These words express this Court's consistent refusal to condone discrimination based on the content of speech. *See, e.g., FCC v. League of Women Voters of California,* 468 U.S. 364 (1984) (statute prohibiting noncommercial

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[6]Appellant's First Amendment claims are necessarily entwined with interests arising under the Equal Protection Clause. The discussion below, in line with recent decisions of this Court, analyzes the Texas sales tax scheme primarily in First Amendment terms.

television and radio stations from editorializing unconstitutional as based on content of message); *Regan v. Time, Inc.*, 468 U.S. 641 (1984) (statute limiting use of photographs on paper currency to "philatelic, numismatic, educational, historical or newsworthy" purposes unconstitutionally permits government to discriminate on basis of content of message); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) (exemption from ban on picketing for labor disputes unconstitutional restriction based on content). Conversely, in cases upholding classifications affecting speech, the Court has carefully noted the absence of content-based discrimination. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (prohibition on camping content-neutral); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (ordinance prohibiting posting of signs on public property "viewpoint neutral"); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548, 551 (1983) (special tax status for veterans' organizations not related to content of speech).

In *Arkansas Writers' Project*, the Court struck down a state sales tax scheme that taxed general interest publications but exempted "religious, professional, trade and sports journals." The Court held that the tax targeted a small group within the press and was thus unconstitutional under the Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). The Court went further:

> Indeed, this case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment

principles: a magazine's tax status depends entirely on its *content*.

• • •

If articles in *Arkansas Times* were uniformly devoted to religion or sports, the magazine would be exempt from the sales tax under § 84-1904(j). However, because the articles deal with a variety of subjects (sometimes including religion and sports), the Commissioner has determined that the magazine's sales may be taxed. In order to determine whether a magazine is subject to sales tax, Arkansas' "enforcement authorities must necessarily examine the content of the message that is conveyed. . . ." *FCC v. League of Women Voters of California*, 468 U.S. 364, 383, 104 S. Ct. 3106, 3119, 82 L.Ed.2d 278 (1984). Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press. *See Regan v. Time, Inc., supra*, at 648, 104 S.Ct., at 3266.

107 S. Ct. 1727-28.

The Texas Court of Appeals, in analyzing the constitutionality of the Texas sales tax scheme which exempts only "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith," ignored this Court's condemnation of content-based discrimination set forth so clearly in *Arkansas Writers' Project*. The Court of Appeals instead read tha case as applying only to situations in which (i) a tax treats the press differently from other enterprises, or (ii) a tax targets a small group within the press as a whole.

While it is true that one basis for the Court's decision in *Arkansas Writers' Project* was the fact that only three publishers actually paid the tax, there is nothing in the

opinion to suggest that the limited burden of the tax was critical to the Court's conclusion that the Arkansas tax scheme unconstitutionally discriminated between publications on the basis of content. Rather, the Court said that the "more disturbing" aspect of the Arkansas statute was its scheme of applying the tax based on the "*content*" of the magazine. 107 S. Ct. 1727-28. This "more disturbing" aspect of the Arkansas statute existed whether three or three hundred magazines paid the tax. There is no connection between the two holdings. *See also*, *Regan v. Time, Inc.*, *supra*; *FCC v. League of Women Voters of California*, *supra*. Moreover, if, as the Texas Court of Appeals suggests, this Court's discussion of content-based discrimination in *Arkansas Writers' Project* was mere dictum, there would have been no need for plenary review in that case; summary reversal on the basis of *Minneapolis Star* would have been appropriate.

Appellant challenged the Texas sales tax on the basis that the tax was in practice paid by only a few publishers, relying on *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). J.A. 6. Evidence adduced at trial established that, while many magazines were sold in the State, only twenty to thirty publishers paid the tax. J.A. 100. Because of its holding that the Texas tax unconstitutionally discriminated on the basis of content, the trial court found it unnecessary to decide the issue. J.S. App. 44. Nevertheless, whether content-based discrimination affects thirty publishers or only

three, the constitutional principle of content-based discrimination is the same.[7]

Rather than examine cases explicitly addressing content-based discrimination, the Texas Court of Appeals instead relied on this Court's decision in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), holding that failure to subsidize a fundamental right did not violate the First Amendment. The Texas court did so in spite of this Court's clear statement in *Regan* that the issue of content-based discrimination was not presented for review. 461 U.S. at 548 ("veterans' originations . . . are entitled to receive tax deductible contributions regardless of the content of any speech they may use"); 461 U.S. at 551 (concurring opinion) ("discrimination between veterans' organizations and charitable organizations is not based on the content of their speech"). The Texas tax scheme in specific and unambiguous terms requires the State to examine a publication's content to determine the availability of the exemption.

This case does not pose a situation where the government has chosen properly to subsidize certain messages, such as the "JUST SAY NO" anti-drug campaign, and not other messages it may subsidize. *See* Justice Scalia's dissent in *Arkansas Writers' Project*, 107 S. Ct. at 1731-32. Here, if the exemption is viewed as a subsidy, the Texas legislature has chosen to subsidize particular religious messages. Under this analysis Texas is making

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[7] In *Minneapolis Star & Tribune Co.*, the tax was imposed on eleven publishers one year and thirteen publishers the next. 460 U.S. at 578-79. There was no issue of content-based discrimination in that case.

a payment to "religious faiths" of six and one-eighth cents for every dollar received in payment for "teachings" they sell. The Establishment Clause clearly prohibits such a payment.

The Texas Court of Appeals' decision is further erroneous because it shifts to Appellant the burden to prove that the exemption applicable to religious publications infringes on Appellant's constitutional right of free speech. The decision conflicts with decisions of this Court in *Minneapolis Star* and *Arkansas Writers' Project*. In *Minneapolis Star*, this Court stated that a "tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest." 460 U.S. at 582. In *Arkansas Writers' Project*, the Court held that:

> *Arkansas faces a heavy burden in attempting to defend its content-based approach to taxation of magazines.* In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.

107 S. Ct. at 1728 (emphasis supplied).

Texas has failed to prove "a compelling state interest" and to demonstrate that the statute is "narrowly drawn" to achieve that interest. Appellees have argued that the exemption of religious publications is necessary to avoid impermissible state entanglement under the Establishment Clause. Motion to Dismiss or Affirm at 8. But the exemption has just the opposite effect. It requires the State to determine whether the publisher is a "religious faith" and to examine the content of each pub-

lication to determine whether it is taxable or exempt. It is the exemption, and not the tax, that gives rise to entanglement.

There is no general exemption for items sold by religious organizations. J.A. 57-58. If a religious organization sells candles, crucifixes, canned goods or clothes, it collects and remits the tax. Thus, the spectre of tax liens and judicial seizure and sale, raised by Appellees' Motion to Dismiss or Affirm at 10, exists even if the exemption for religious periodicals did not exist.

The Court's recent decision in *Arkansas Writers' Project* mandates the result in this case. There is no basis for distinction. The judgment of the Texas Court of Appeals should be reversed, and the judgment of the trial court should be affirmed.

II. The exemption from tax for religious periodicals constitutes a "law respecting an establishment of religion."

Section 151.312 of the Texas Tax Code exempts from sales tax "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith" in violation of the Establishment Clause. The decision of the court below, upholding the exemption as constitutional, attacks the time-honored and constitutionally mandated separation of church and state.

This Court has created a three-part test to determine whether a statute violates the Establishment Clause:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . .

> finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The Texas statute fails in all three respects. *See Edwards v. Aguillard*, 107 S. Ct. 2573 (1987).

First, there is no secular legislative purpose for the statute. Appellees have asserted a secular purpose of avoiding entanglement with religion. Motion to Dismiss or Affirm at 10. Yet it is clear that the State is not *required* to exempt all activities of religious groups from taxation. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943). The State of Texas has not, in fact, done so. Sales of tangible personal property by religious organizations are generally subject to sales tax.[8] Only sales of those magazines and books whose content complies with Section 151.312 are exempted from the tax.

Sales tax here is easily calculated on the basis of sales price regardless of the identity of the seller. The State is in fact required to collect tax on most sales by religious organizations. It is the exemption, and not the tax, which gives rise to examination and inquiry about religious faith and religious teaching. It is the exemption that creates entanglement.

Second, the exemption for religious periodicals advances religion because it singles out religion to receive a benefit not available to other charitable causes. This preference is far more restrictive than the broad exemptions

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[8]Tex. Tax Code Ann. § 151.310(c) permits a one day tax free sale or auction once a year by an educational or religious organization. Other sales are subject to tax. *See* J.A. 57-58.

considered by this Court in *Walz v. Tax Commission*, 397 U.S. 664, 672-73 (1970), in which the Court upheld a tax exemption granted to numerous "nonprofit, quasi-public corporations" that foster "moral or mental improvement" of the community at large. *See also Committee for Public Education v. Nyquist*, 413 U.S. 756, 794 (1973) ("narrowness of the benefited class would be an important factor"); *Gillette v. United States*, 401 U.S. 437, 454 (1971) (tax exemptions, like those in *Walz*, permissible "so long as an exemption is tailored broadly enough that it reflects valid secular purposes").

Tax exemptions have been compared by this Court to a subsidy. *Regan v. Taxation With Representation of Washington*, *supra*, 461 U.S. at 544; *Arkansas Writers' Project, Inc. v. Ragland*, *supra*, 107 S. Ct. at 1731 (Scalia, J., dissenting). There can be no doubt that decisions of this Court bar payment by the State of a subsidy to religious organizations. *See e.g., School District of City of Grand Rapids v. Ball*, 473 U.S. 373, 394, 395 (1985) (direct cash subsidy to religious school prohibited under Establishment Clause); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 774-81 (1973). A more direct advancement of religion is difficult to imagine.

Third, the statute on its face requires excessive government entanglement with religion. The exemption requires the State to determine (i) whether the publisher or distributor is a "religious faith" and (ii) whether the contents of the publication consist "wholly of writings promulgating the teaching of the faith." As in *FCC v. League of Women Voters of California* and *Arkansas Writers' Project*, "enforcement authorities must necessarily examine the content of the message that is conveyed. . . ."

Appellees rely on the testimony of the woman who, at the time of trial, was the Supervisor for Sales Tax Policy in the Comptroller's office to avoid the entanglement issue. Mrs. Wanda Hutchinson testified:

> (Question as to what periodicals have been sent to the Comptroller's office.)
>
> A. I think what is sent in normally is the organization itself will give us the name of what is being published and ask us if that particular publication qualifies for a sales tax exemption.
>
> Q. And you decide?
>
> A. No sir. What we normally do is to see if the organization is a religious organization.
>
> Q. And if the religious organization—anything they publish you let come out under that exemption?
>
> A. What we tell them is we leave it to (p. 72) them to decide whether or not it's a religious—a publication or periodical that teaches their faith. We do not make that determination.
>
> Q. Because there's no—you don't have any authority to make it in advance of somebody trying to collect the tax from them?
>
> A. Well, I think it's mainly just because we don't want to get involved in deciding whether something is sacred to a religious faith or not.

J.A. 60-61.

The repugnancy to Mrs. Hutchinson of the task required by the clear statutory language and her unwillingness to enforce the letter of the law does not alter the statute nor guarantee that the next person who fills her post will not be more zealous. Mrs. Hutchinson's informal construction has never been issued as a regulation or rule

by the Comptroller, whose published rules essentially repeat the statutory language of Section 151.312. 34 Tex. Admin. Code § 3.299(d); J.S. App. 59. The majority of the Texas Court of Appeals found that this testimony could save the statute. But the exemption clearly requires a governmental official to evaluate the practices of the group seeking the exemption to determine whether it is a "religious faith." The tax official is also required to read what is written to see if it conforms to the teachings of that faith. A statute requiring more entanglement is difficult to imagine. If a court is prohibited by the First Amendment from deciding ecclesiastical questions, a state official certainly is prohibited from doing so. *See Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 446 (1969).

But even assuming the practice of the tax supervisor holding that position at the time of trial is binding on the State,[9] it does not save the statute from unconstitutionality. Under the State's interpretation, the statute confers a special benefit only on religious organizations and achieves no other purpose. Such a construction renders the statute unconstitutional under the second prong of the *Lemon* test.

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[9]It is clear that under Texas law Mrs. Hutchinson's practice is not binding on the State. Departmental practice by Texas administrative agencies "affords no basis for practices which are contrary to the plain meaning of statutes." *Brown Express, Inc. v. Railroad Commission*, 415 S.W.2d 394, 397 (Tex. 1967). Moreover, the State is not estopped from collecting taxes lawfully due by statements of its employees, or even by adopted rules. *Central Power & Light Co. v. State*, 165 S.W.2d 920, 923 (Tex. Civ. App.—Austin 1942, writ ref'd); *Bullock v. Ensearch Exploration, Inc.*, 614 S.W.2d 215, 218 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.).